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IN THE

Supreme Court of the United States

M. ALEXANDER FORMAN and BETTY FORMAN, his wife, *Appellants*

v.

Irwin Apfel, Liquidating Receiver of Self Drive It Corporation and Richard S. Robinson, Petitioning Shareholder

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Supreme Court of Pennsylvania which was entered on September 30, 1957. The jurisdiction of this court is invoked under the provisions of the United States Constitution, the Fourteenth Amendment thereto—"nor shall any State deprive any person of life, liberty or *property*, without due process of law;—", because the court below held a statute of Pennsylvania constitutional which permitted the court to appoint a receiver for a solvent going corporation without notice to the corporation or other stockholders, without an opportunity to be heard.

OPINION BELOW.

The opinion of the Common Pleas Court sur motion to quash the proceedings and sur exceptions to orders and decrees of the Common Pleas Court of Philadelphia County is as printed in the "Record" for the use of the Supreme Court of Pennsylvania, below, on P. 44a-50a.

In the Appendix B hereto, infra, P. 20, as reported in 390 Pa. 161; 134 A. 2d 662, et seq., is the opinion of the Supreme Court of Pennsylvania from which this appeal is taken.

JURISDICTION.

This suit was brought in Common Pleas Court No. 1 of Philadelphia County, Pennsylvania, when a stockholder presented a petition to a Judge of that court, in chambers, asking for the appointment of temporary receivers for a solvent going corporation. The court forthwith allowed the petition in chambers without notice to the corporation or other stockholders and the receiver immediately took charge of all of the property of the corporation. Thereafter, the appellants who own 50% of the stock of the corporation filed a motion under Rule 251(c) of the Common Pleas Court to quash and set aside the appointment of temporary receivers as being without due process since it lacked notice and an opportunity to be heard. The Court dismissed the petition to quash. An appeal was taken, to the Supreme Court of Pennsylvania, assigning that the appointment of the temporary receivers was without due process and that the Statute of Pennsylvania, the Business Corporation Law, 15 P. S. 2852-1107 et seq. under which the proceeding was brought was unconstitutional since it lacked due process and deprived the appellants of their property without due process. The Supreme Court of Pennsylvania upheld the validity of the statute. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. Code Annotated §1257(2).

QUESTION PRESENTED.

Whether there is an unconstitutional lack of due process as required under the Fourteenth Amendment of the Constitution of the United States, where a judge of a Common Pleas Court, under a State statute, in chambers, upon an ex parte petition, sworn to by petitioner, but unaccompanied by any supporting affidavits, without notice or opportunity to be heard, appoints temporary receivers for a solvent going corporation thereby divesting the owners of fifty percent of the stock of the corporation of their stock and the business; and whether any action of the shareholders, who own fifty percent of the stock of the corporation in thereafter contesting the receivership of the corporation and the further handling of the void action can or does cure, validate or make lawful the unconstitutional void action of the Court in originally appointing the temporary receivers without due process and vesting title of the solvent corporate property in those receivers; and whether at all the entire record shows any facts upon which the Court could act were the court's actions clothed with due process, under the statute.

STATUTE INVOLVED.

The Statute involved is the statute of the State of Pennsylvania known as the Business Corporation Law of May 5, 1933, P. L. 364, 15 Purdon's Pennsylvania Statutes, Section 2852-1107, as amended, and set forth in Appendix p. 19, hereto.

STATEMENT.

On October 24, 1956, a petitioner, one, Robinson, filed a petition in the Common Pleas Court of Philadelphia averring that he and his wife owned 100 shares of common stock of the Self Drive It Corporation being fifty percent of the total issued capital stock and that the remaining fifty percent of the stock was owned by M. Alexander Forman and his wife, Betty Forman, the appellants here. Robinson's wife did not join in the petition. Hence, it is the petition of the owner of forty nine and one half percent of the stock. The petition averred that the directors of the corporation were deadlocked in the management of the corporate affairs; the shareholders were unable to break the deadlock and irreparable damage was being suffered by the corporation (p. 8a of the Record below).* These averments were a paraphrase of the Business Corporation Law, as quoted in Appendix p. 19, hereto. The petition further averred that the actions of the officers, directors and shareholders prevented the corporation from properly functioning and that certain officers had refused and continued to refuse to carry out their duties, particularly to sign checks with which to

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* The Supreme Court of Pennsylvania, has certified a copy of the record as printed on the appeal to that court. The pagings herein refer to the pages of that printed record as certified to this court.

pay employees and to meet obligations of the corporation. That there was danger of mis-application of funds and that there had been mis-application of funds (p. 9a, Record below). These latter averments were not under the "Statute Involved". The petition prayed that a receiver be appointed to take possession subject to further order of the Court. The petition was sworn to. There were no accompanying affidavits in support of the averments of the petition. The petition was presented to a judge of the Common Pleas Court of Philadelphia in chambers, who immediately allowed the petition and appointed temporary receivers of all of the assets and property of the corporation and empowered the receivers to operate the business, to borrow $75,000. if necessary, to file report with the Court (p. 6a, Record below) and directed they were to operate the business for sixty days when the Court should fix a date for hearing and after a full hearing thereon make determination upon the appointment of a *permanent* receiver (p. 7a, Record below).

That initial proceeding on which the entire case depends, was in chambers without notice to Forman and his wife or to the corporation. The receivers immediately took over all property. They were in possession before the Formans or the corporation had notice. They filed a report on November 15, 1956, which showed the corporation to be solvent and to have earned approximately $26,000. in the first nine months of 1956, before taxes (P11a and P12a of the Record below as certified). The Common Pleas judge in an opinion (p. 46a, Record below) said the corporation being solvent and no fraud being claimed, the only remedy petitioner had was under the statute, i. e. the Business Corporation Law, 15 P. S. 2852-1107. Thereafter, a petition was filed on November 15, 1956, which (p. 13a, Record below) was heard and the Record of that hearing is entitled "Hearing on Petition for Appointment of Liquidating Receiver". Testimony was taken and the matter was continued at request of Forman's counsel until November 28, 1956 (p. 35a, Record below) where the hearing Judge said that this was a continued hearing to have a *permanent* receiver appointed

and counsel for the Formans said that he and his clients had been led to agree and to say to the Court they should do nothing further (meaning at the hearing), but agree to the Court appointing a permanent receiver *"and move on from that point."* Counsel for the petitioners who was now counsel for the receivers also, then stated they were seeking the appointment of a liquidating receiver (p. 35a, Record below), and the Court forthwith appointed a liquidating receiver.

Thereafter on December 7, 1956, a motion under Rule 251(c) of the Common Pleas Court was filed on behalf of the Formans asking the Court to quash, set aside and dismiss the proceeding and assigned inter alia:

> "(1) The said petition was filed with the Court under the provisions of the Business Corporation Law of Pennsylvania (Act of May 5, 1933, P. S. 364, 15 P. S. 2852-1107-1112), the orders, decrees and actions of the Court were predicated upon the said petition; and the said Act, i. e. the Business Corporation Law of Pennsylvania, 15 P. S. 2852-1107 to 1112 are unconstitutional since the said Act violates the Fourteenth Amendment of the Constitution of the United States providing inter alia: '* * * nor shall any state deprive any person of life, liberty or property, without due process of law; * * *'
>
> being U. S. Code Annotated, Constitution, Amendment Fourteen, Page 69." (pp. 36a-37a, Record below.)

In an opinion dated December 19, 1956, the Common Pleas Court dismissed the motion to quash (p. 44a to p. 50a, Record below). It held that inasmuch as the corporation was entirely solvent and no rights of creditors were involved the action was under the Pennsylvania Business Corporation Law of 1933, 15 P. S. 2852-1107 to 1108. Appendix p. 19. It further held that each step of the proceedings had been taken in strict accordance with the Pennsylvania Business Corporation Law of 1933 and that there was no merit in the

motion to quash, set aside and dismiss the proceedings (p. 49a, Record below). It did not discuss or specifically decide the constitutional question raised by the exception numbered 1 (quoted above) but dismissed the exception No. 1 by the general order that the motion was without merit, because as the court said, the petitioners and their counsel had appeared and had consented to the appointing of a liquidating receiver in course of contesting the constitutionality of the receivership.

The Formans filed appeal to the Supreme Court of Pennsylvania as of January Term 1957, No. 193 and in that appeal assigned the refusal of the Common Pleas Court to hold that the appointment of the temporary receivers for the solvent corporation upon an ex parte petition without notice and without opportunity to be heard, whereby shareholders were divested of their property and business, was unconstitutional and void because it was without the due process required under the Fourteenth Amendment of the United States Constitution. The question was considered by the Supreme Court of Pennsylvania as shown by its decision in 390 Pa. 161, 134 A. 2d 662, p. 666, Appendix P. 24, where it said "On this appeal appellants argue * * * (2) that the Court below appointed a receiver without an opportunity being afforded to answer the petition before the receiver took over, that the Court never made findings of fact or law as such and that the entire proceedings lacked due process, and are consequently void."

The Supreme Court then said that, because counsel for stockholders, the Formans, appeared at the "Hearing on the Appointment of a Liquidating Receiver" for the corporation; conducted partial hearing on that petition; asked for and was granted a continuance and at the continued hearing said to the Common Pleas judge—"events after that (the prior hearing) had led me and my clients (i. e. the Formans, not the corporation) to agree and say to the Court that we should do nothing further but agree to the Court appointing a *permanent* receiver *and move on from that point*" that this was in effect agreement to the receivership.

The next words, in the record after the words "that point," were the following colloquy had by counsel for Robinson and now counsel for the receivers, also, and the Court (p. 35a, Record below):

> "MR. MILLER: If it pleases your Honor, although the term 'permanent receiver' is used, we speak of a 'liquidating receiver' within the purview of the Business Corporation Act of 1933, sections 1107 and 1108.
>
> THE COURT: Oh, I see. That is the correct term, is it, 'liquidating receiver', rather than 'permanent receiver'?"

The Supreme Court said these actions and words constituted a failure by counsel for the Formans to offer any objection to what was being said or done and that the Formans, i. e. stockholders, thereby consented to the appointment of an incorrectly described "permanent" but really a "liquidating" receiver for the corporation, not for the Formans, and that "appellants did not object or, in fact, say anything at all which would have the effect of qualifying their consent." This despite the fact that counsel had said in the same sentence and breath—"*and move on from that point.*—"

The Supreme Court spoke thus of the second and interim petition, and not of the original petition for temporary receivers which is attacked as unconstitutional and without due process. Therefore, the Supreme Court of Pennsylvania has held that counsel for shareholders, the petitioners, here did not oppose the appointment of a permanent receiver (corrected to liquidating receiver) for the solvent corporation; that this was failure to contest the appointment of a liquidating receiver for the solvent corporation; and that this failure made valid the prior void appointment of temporary receivers for the solvent corporation which began the proceeding. That is, the defect of unconstitutionality was cured because counsel for the petitioners, not for the corporation, here allegedly "consented" to the appoint-

ment of a "permanent" receiver. Counsel for stockholders said that he would not "further" do anything at that hearing, but agree to the appointment of a "permanent receiver". But counsel also said "*—and move on from that point*" (p. 35a, Record below). This statement, the Supreme Court and the Common Pleas Court have completely ignored.

That hearing was on November 28, 1956 (p. 34a, Record below). On December 7, 1956, or nine days thereafter, counsel for the Formans did—"*move on from that point*" by filing a petition to quash, set aside and dismiss the above proceeding (pp. 36a-37a, Record below) and assigned that "the orders and actions of the Court predicated upon the said petition and the said act—are unconstitutional since the said act violates the Fourteenth Amendment of the Constitution of the United States providing inter alia "nor shall any State deprive any person of life, liberty or property without due process of law; * * *".

There had been no opportunity to interpose this defense when the petition was filed and allowed in chambers and the receiver was appointed without notice or opportunity to be heard, and the Court, in chambers gave the corporate property to receivers.

The constitutional question could be raised only by a motion to dismiss assigning that the proceeding was unconstitutional, and after the property had been taken.

It was raised at the earliest possible moment by stockholders after it was stated to the Court that the Court would not be opposed in appointing a *permanent* (?) receiver and the stockholder-petitioners would "*—move on from that point—*".

The appointment of the liquidating receiver for the solvent going corporation with instructions to liquidate the business and sell the property was an order following the original appointment of temporary receivers without due process. This original order being void, the subsequent order is sought to be declared as void and of non-effect, and

as not validating and making lawful the unconstitutional act and actions, wherein the temporary receivers were appointed for the solvent going corporation.

Within nine days, seven business days, after a liquidating receiver was appointed, the motion to quash was filed because the proceeding was instituted without due process. It was a point and question on the subsequent appeal to the Supreme Court of Pennsylvania, and was decided by the Supreme Court as indicated above.

The constitutional question has been carefully raised, dismissed and preserved for the purpose of this appeal.

THE QUESTIONS ARE SUBSTANTIAL.

The issues involved in this case are substantial for the reasons set forth in the following numbered paragraphs.

1. The decision of the Court below (Supreme Court of Pennsylvania) in the instant case is directly in conflict with the decision of the Third Circuit Court of Appeals in the case of *Nottebaum vs. Leckie*, 31 F. 2d 556. Both courts have appellate jurisdiction in Pennsylvania, in their respective spheres of judicial authority. Their decisions are final, the one in the Federal system; the other in the State system.

The case of *Nottebaum vs. Leckie*, 31 F. 2d 556, arose in the State of New Jersey under its General Corporation Act [2 Comp. St. N. J. 1910, pp. 1640, 1644 Sections 65, 66], and there the treasurer of the corporation,—

> "* * * filed a bill of complaint in equity against the Noxon Chemical Products Co., Inc., alleging among other things that the plant had ceased all operations, that there was no money available for carrying on the work of the plant, that the company was insolvent, and asking for the appointment of a receiver." 31 F. 2d 556, p. 558.

It is to be noted insolvency was there alleged. This action was instituted in the United States District Court for the District of New Jersey, at Newark and:—

> "Although no notice of any kind of the filing of the bill was given to the company or alleged to have been given—nor were any specific facts shown by affidavit, or by verified bill, which could legally dispense with such notice, the Court, nevertheless, appointed—receivers of the said corporation until further order of the Court, together with all the properties of the defendant and of every description, real and personal; the defendant and all persons acting under it being directed to deliver to the receivers any and all of its properties—. The receivers were further authorized to take complete control of defendant's property wherever found—with all the powers of receivers in cases of that kind, and to make report of their proceedings to the Court."

The decree also contained a broad form injunction staying all actions against the corporation by any person. 31 F. 2d 556, p. 558.

> "The defendant had no notice or knowledge of these proceedings until the receivers armed with the Court's decree, appeared on the premises, ousted the defendant therefrom, and took full possession of its property, assets, and business. 31 F. 2d 556, P. 559.
>
> "What, then, is the legal situation? On the presentation of the bill and affidavit, the court passed summarily on the case so presented, and finding the facts there asserted to be true, appointed receivers, which immediately and of itself, divested the defendant of all its property. This was a final decree." 31 F. 2d 556, p. 559.
>
> * * * * * * * *
>
> "The receivers were appointed, as shown by the decree, until further order of the court. This is the situ-

ation as to all receivers. They are merely the arm of the court, and subject to the court's orders. In this final decree the proceeding as a suit inter partes, was at an end." 31 F. 2d 556, p. 560.

* * * * * * * * *

"The federal courts have not been less emphatic in their condemnation of proceedings instituted without notice to a party to defend. In Riverside & Dan River Cotton Mills v. Menefee, 237 U. S. at page 193, 35 S. Ct. 580 (59 L. Ed. 910) Mr. Chief Justice White said: 'That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement.' And at page 194 (35 S. Ct. 580): 'And that a corporation no more than an individual is subject to be condemned without a hearing or may be subjected to judicial power in violation of the fundamental principles, of due process as recognized in Pennoyer v. Neff (95 U. S. 714, 24 L. Ed. 565), is also established by the cases referred to and many others. * * * Whenever a provision of the Constitution is applicable the duty to enforce it is imperative and all-embracing and no act which it forbids may therefore be permitted.' This is only a general statement of the well-settled principle of law." 31 F. 2d 556, p. 560.

* * * * * * * * *

"We stop to inquire, therefore, what subsequent act of the defendant has validated this unlawful procedure? What subsequent act of the defendant has breathed into the dead body the breath of life? By what legal alchemy has this transmutation been wrought? Does some vain attempt to undo the wrong so couple it with the proceeding as to make lawful that which before was wholly unlawful? Because some creditor or stockholder attempted, in obedience to the court's direction, to show cause why an illegal decree should not stand, does the denial of his right clothe such decree with the vesture of legality? Does the Court's assumption to do

what was forbidden by the Constitution and law of the land become a lawful exercise of power by reason of some act of commission or omission on the part of a creditor or stockholder? Most certainly not." 31 F. 2d 556, p. 561.

"On November 9, 1926, Ralph Nottebaum, Sr., holder of a majority of the common stock, and Rudolph Nottebaum, a creditor, presented a petition, which was joined in by a majority in number and interest of the unsecured creditors, charging conspiracy to secure control of the company, both before and after the receivership, falsehoods in the bill of complaint, machinations to bring about a condition of insolvency, false and fraudulent inventory and appraisement, and other matters." 31 F. 2d 556, P. 561.

* * * * * * * * *

"To briefly recapitulate:

1. The appointment of the receivers without notice or an opportunity to be heard, and the resulting divestiture of defendant's property and business, was a taking of their property without due process of law, and therefore illegal and void from the beginning.

2. The order of February 25th, appointing the receivers and granting an injunction against the defendant, was a final decree, in which the suit between the parties was at an end. The decree not only divested the defendant of its property, but, by denying to the company the power to exercise its franchises, created a trust for the administration of its property under the supervision of the court.

3. By the order of August 6th, the power of the receivers was simply continued. The status and rights of the defendant company, under the order of February 25th, were in no manner altered or affected by the order of August 6th." 31 F. 2d 556, P. 562.

In this case now before this Court the Supreme Court of Pennsylvania has held that the appointment of temporary

receivers for a solvent going corporation without notice or opportunity to be heard and the taking of the property of the solvent corporation was not without due process and that it was a constitutional taking of the property, because counsel in a subsequent interim proceeding withdrew opposition to an interim action of the Court, and said the matter would be "—move(d) on from that point—."

The Court held (in effect) this was agreement and consent which validated the prior void, unconstitutional, unlawful act of the court in appointing temporary receivers without notice and opportunity to be heard.

The conflict in the decisions of these Courts, the one controlling in the federal jurisdiction and the other in the State jurisdiction, in the same State upon the same constitutional question, logically ought to be resolved by this Honorable Court.

2. The action of the Court in appointing temporary receivers of a solvent corporation without notice and opportunity to be heard being a void act because unconstitutional all other actions of the Common Pleas Court subsequent thereto in appointing liquidating receiver and ordering the sale of the assets inter alia, were null and void and of no effect, no matter what action or consent might transpire at any subsequent interim step in the further handling of the void suit.

> "An unconstitutional act is not a law; it confers no rights, it imposes no duties; it affords no protection; it creates no office, it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. County of Shelby*, 118 U. S. 425, 6 Supreme Court Reporter (West. Pub. Co.) 1121, p. 1125.
>
> "Wherever a provision of the Constitution is applicable the duty to enforce it is imperative and all embracing and no act which it forbids may therefore be permitted." *Riverside & Dan River Cotton Mills v. Menefee*, 237 U. S. 189, p. 196, 35 S. Ct. 579, p. 581.

3. Notice and an opportunity to be heard are the basic essentials of due process and where notice and an opportunity to be heard are lacking there is an unconstitutional denial of due process. And process lacking these essentials is void.

"Notice of suit and opportunity for hearing are requisites of due process."

This phrase is taken from 17 Fed. Digest of West Reporter System, Constitutional Law under Key No. 309 (1) on P. 721. Following it there are cited many cases in this Court and in other Federal Courts too numerous and not desirable or necessary to be cited in this jurisdictional statement. One of the last decisions of this Court which is there cited concerns the revocation of a doctor's license to practice, *Missouri Ex Rel Hurwitz vs. North*, 46 S. Ct. 384, P. 385, 271 U. S. 40: "Its (due process) requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard, and to present his claims or defense."

The rule has been applied in many and varying circumstances. And is so well known that further citation of authority and cases is but briefly made in this statement.

The following cases are authority for the proposition that the first of the procedural formalities required by due process of law is notice:

Crane v. Hahlo, 258 U. S. 142, 42 S. Ct. Rep. 213 (eminent domain).

Spencer v. Merchant, 125 U. S. 345, 8 S. Ct. Rep. 921 (assessment).

Central of Georgia Ry. vs. Wright, 207 U. S. 127, 28 S. Ct. Rep. 47 (assessment and valuation).

Chicago etc. Ry. vs. Minnesota, 134 U. S. 418, 10 S. Ct. Rep. 702 (determination of rates for public utilities). Concurring opinion of Justice Miller.

The second essential is an opportunity to be heard:

Riverside etc. Cotton Mills vs. Menefee, 237 U. S. 189, 35 S. Ct. 579;
Willis on Constitutional Law, 1936 Edition, pp. 664 and 665.

The Supreme Court of Pennsylvania has said:

"The fundamental requirements of due process in a proceeding affecting property rights are a notice which is an adequate safeguard to the rights of the parties and an opportunity to be heard."
Ex Rel Chidsey vs. Keystone Casualty Co., 373 Pa. 105 (Certiorari denied 74 U. S. Supreme Court 79).

4. The question is a general one and of importance to all corporations since it may be sought to have a receiver appointed for any solvent going corporation. If a solvent going corporation may be put into receivership upon the ex parte petition of a minority stockholder or of a stockholder owning fifty percent of the stock of the corporation without notice and an opportunity to be heard, and in an in chambers allowance, it must be apparent, without argument and upon its mere assertion, that such proceeding endangers the uninterrupted existence of every corporation. It is a drastic and fearsome statute and rule that any solvent going corporation may be placed in receivership and its property turned over to a receiver upon the ex parte unsupported petition of any stockholder, particularly a minority stockholder, without notice of the petition and without an opportunity to be heard.

5. The principle that litigants appearing in Court to contest an unconstitutional and void decree by something done or said by the said litigants or their counsel in course of handling, protesting and contesting the unconstitutional procedure may validate the unconstitutional act which was

void from the beginning, and make the unconstitutional act or action of the court a lawful valid exercise of the court's powers, is the assertion of a rule that the constitutional safeguards may be set aside by individuals, merely by contesting, protesting and defending against the unconstitutional acts, and thus make valid that which is void and invalid, under the constitution.

Such a rule and proposition is in the face of the opinion of this Court in *Norton v. Shelby*, 6 U. S. S. Ct. 1121, p. 1125.

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The clearest court pronouncement on this proposition is that quoted above from *Nottebaum vs. Leckie*, 31 F. 2d 556, P. 561:

> "Does the court's assumption to do what was forbidden by the Constitution and law of the land become a lawful exercise of power by reason of some act of commission or omission on the part of a creditor or stockholder? Most certainly not."

Hence, this Honorable Court is asked to review the holding of the Supreme Court of Pennsylvania which is to the effect that an act and a proceeding thereunder void from the beginning may be validated and made lawful because in the course of a subsequent interim hearing counsel for litigants did not oppose some subsequent interim action of the Court but stated they would agree to the court carrying out its announced interim intent—"and move on from that point—" and thereafter moving to quash the entire proceeding, because it is unconstitutional.

The implication is that anyone may start a void unconstitutional proceeding and that by collusion or otherwise some subsequent act of a contestant can make that which

was void and unconstitutional from the beginning valid and lawful by such subsequent act of counsel or party. There is no end to the possibilities that would exist for defeating constitutional safeguards if that be the law of the land.

CONCLUSION.

For the foregoing reasons, this appeal should be heard and the constitutional question determined.

Respectfully submitted,

THOMSON F. EDWARDS,
J. WEBSTER JONES.

APPENDIX A—STATUTES.

Pennsylvania Statute Relating to Corporations.

15 Purdon's Pennsylvania Statutes §2852 et seq.

"§2852-1. Short title

Be it enacted, &c., That this act shall be known, and may be cited, as the 'Business Corporation Law.' (1933, May 5, P. L. 364, art. I, §1.)"

* * * * * * * * *

"§2852-1107. Involuntary proceedings for winding up and dissolution.

A. The several courts of common pleas of the Commonwealth may, upon petition filed by a shareholder of a business corporation, entertain proceedings for the involuntary winding up and dissolution of the corporation, when it is made to appear:

* * * * * * * * *

(4) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof.

* * * * * * * * *

C. Any petition for the involuntary winding up and dissolution of a corporation, authorized to be filed under this section, shall be filed with a court of common pleas of the county in which the registered office of the corporation is located. (1933, May 5, P. L. 364, art. XI, §1107.)".

APPENDIX B—OPINIONS AND JUDGMENT BELOW.

This appeal was taken from an order of the Court of Common Pleas No. 1 of Philadelphia County, dated December 19, 1956, dismissing appellant's motion to quash, set aside and dismiss all proceedings in the matter in controversy up to the date of the motion.

Self Drive It Corporation is a "closed" Pennsylvana corporation the capital stock of which is owned entirely by two married couples who also serve as its only four directors. Appellants, M. Alexander Forman and Betty Forman own —respectively—49% and 1% of the capital stock; appellees, Richard S. Robinson and Florence H. Robinson, own—in the same proportion—the other half of the corporate stock. The control of the corporation is thus divided evenly between the two families.

On October 26, 1956, appellee Richard S. Robinson petitioned the Court of Common Pleas No. 1 of Philadelphia County under §1107 (A) (4) of the Pennsylvania Business Corporation Law of 1933, as amended, for the appointment of a receiver "to liquidate the assets and wind up the business of the corporation in the nature of a "dissolution." The petition contained an allegation, couched in the language of §1107 (A) (4) of the statute, supra, that the directors were deadlocked in the management of the corporate affairs, that the stockholders were unable to break this deadlock, that irreparable damage and injury were being suffered by the corporation, and such damage and injury would continue and be of such a character and nature as to destroy the stockholders' equity and be injurious to the creditors.

On the same day the court below, pursuant to §1108 (A) of the Business Corporation Law, supra, 15 P. S. §2852-1108 (A) appointed one Irwin Apfel and one David Cohen as *temporary* co-receivers of the corporation, specifically stating that the court would fix a date for the full hearing on the petition and facts at which time it would determine

whether, and for what purposes, a *permanent* receiver should be appointed.

The temporary co-receivers were ordered to file an inventory and appraisement of the assets and property of the corporation and to make a report to the court thereon within 30 days. Pursuant to this order, on November 15, 1956, an exhaustive and comprehensive report was filed in which the temporary co-receivers reviewed the nature, history and problems of the business and concluded with the recommendation, buttressed with full reasons therefor, that a liquidating receiver should be appointed whose primary duty should be to liquidate the corporate assets.

On the same day the court below ordered that a hearing be held for the purpose of determining whether or not a "*liquidating*" receiver should be appointed. At this hearing, on November 21, 1956, appellee Robinson introduced testimony: (1) that neither the Robinsons nor the Formans were able to control the corporation because each family owned 50% of the stock; (2) that there had been a serious dispute existent for several months between Richard S. Robinson and M. Alexander Forman which had arisen because of Mr. Forman's insistence that the corporation's fleet of motor vehicles should be reduced; (3) that as a result of this dispute Mr. Forman, who served as secretary-treasurer of the corporation, on one occasion had refused to sign the payroll checks of the corporation and that this unexplained refusal had resulted in the employees being unpaid at the proper time, thereby revealing to them the dissension existent in the management and affecting their morale; (4) that on another occasion Mr. Forman had refused to sign a check for approximately $29,000. (payable to the bank on which the corporation depended for its financing) on the date when the payment became due and that he persisted in this refusal until Mr. Robinson was forced to reveal to the bank the dispute within the corporation's management and the inability of the stockholders (who comprise the entire management) to resolve this dispute.

At the hearing appellants' counsel cross-examined ap-

pellee Robinson and his witnesses but failed to offer any evidence at all to rebut their testimony. At appellants' request and over appellees' objection the hearing was continued until November 28, 1956, so that appellants could further prepare and review their case.

When the continued hearing was resumed the following colloquy—the importance of which is self-evident—occurred:

> "The Court: This is a hearing, a continued hearing, is it not, on a petition to have a permanent receiver appointed?
>
> "Mr. Miller: (counsel for the temporary receivers) Yes, Sir.
>
> "Mr. Jones: (counsel for the appellants) That is right. At the last hearing I made representation to the Court that I desired to file certain exceptions. *Events after that—since then we have had two business days, Friday and Monday—Events after that had led me and my client to agree and say to the Court that we should do nothing further but agree to the Court appointing a permanent receiver and move on from that point,* your Honor. (Emphasis supplied.)
>
> "Mr. Miller: If it pleases the Court, although the term 'permanent receiver' is used, we speak of a 'liquidating receiver' within the purview of the Business Corporation Act of 1933, sections 1107 and 1108.
>
> "The Court: Oh, I see. That is the correct term, is it, 'liquidating receiver', rather than 'permanent receiver'?
>
> "Mr. Miller: That is right. * * *."

It must be noted, parenthetically, that nowhere during the course of this discussion did appellants offer any objection whatsoever to what was being said or being done. The record could not possibly be any more clear on this point. Appellants consented to the appointment of what their counsel incorrectly described as a "permanent" receiver.

Appellees immediately corrected this mistake, asserting that the correct term was "liquidating receiver" and the Court took immediate cognizance of the correction. *Appellants did not object or, in fact, say anything at all which would have the effect of qualifying their consent.* It can only be assumed, from the face of the record, that appellants consented to the appointment of a liquidating receiver.

This conclusion becomes even more inescapable in view of what was said shortly thereafter, at the conclusion of the hearing:

> "The Court: I will appoint Mr. Apfel as liquidating receiver. As you know, the Court may appoint a receiver on its own motion and eliminate one suggested by the original petitioner. This is no reflection whatsoever on Mr. Cohen, for whom I have high regard. It is just that at this point there is no necessity for two receivers and we want to keep the expense down.
>
> "Mr. Miller: I appreciate that.
>
> "The Court: I see that Mr. Cohen is in Court and I know that he will understand exactly what I am stating, that this is in no sense any criticism of him or any reflection on him. Mr. Irwin Apfel is appointed sole liquidating receiver. The bond heretofore required may be continued until further order of the Court. There is no use increasing the amount of the bond unless the necessities of the situation require it.
>
> "Mr. Miller: Very good, sir.
>
> "The Court: Whatever is to be done is to be done with the knowledge of all the parties concerned and nothing will be approved by the Court without ample notice and hearing. I hope that the parties will find a way of getting the very most they possibly can from this very profitable business."

Again, appellants neither objected nor gave any indication whatever that they intended to qualify their consent to the appointment of a receiver. It should be noted, however,

that they did not even attempt to present the case which they had stated, on November 21, 1956, that they needed additional time to prepare. The conclusion is unavoidable in view of this record that appellants' claim they consented only to the appointment of a permanent, and not a liquidating receiver, is untenable.

The order of November 15, 1956, fixing the hearing could not have been any more specific as to the purpose of that hearing ("* * * to determine whether a *liquidating* receiver should be appointed in the above matter") (Emphasis supplied), and again, appellants stood mute while a complete explanation and distinction was drawn between "liquidating" and "permanent" receivers in open court. Under these circumstances we have no alternative but to hold that at the continued hearing which occurred on November 28, 1956, appellants consented to the appointment of a liquidating receiver for the corporation.

Thereafter, on December 4, 1956, the liquidating receiver petitioned for leave to sell the corporate assets. On December 5, 1956, the court below ordered the liquidating receiver to sell the corporate assets in open court to the highest bidder on December 19, 1956. On December 7, 1956, the appellants filed a motion to quash, dismiss and set aside the proceedings which motion the court below denied by a written opinion and order dated December 19, 1956. Appellants thereupon took this appeal.

The sale ordered by the Court was continued twice *at appellants' request*, but finally, on January 8, 1957, the assets of the corporation were sold to the highest bidder.

On this appeal appellants argue: (1) that there was insufficient evidence to support the averments of the petition that there was a deadlock in the management and that the corporation was suffering irreparable injury; (2) that the court below appointed a receiver without an opportunity being afforded to answer the petition before the receiver took over, and the Court never made findings of fact or law as such, and that the entire proceedings lacked due process and are consequently void; (3) that the court below lost all

further jurisdiction when the appeal was taken and certiorari lodged in that court.

[1, 2]. We deem it wholly unnecessary to consider the merits of the appellants' first two assumptions in view of the fact that they, as has been explained, expressly consented to the appointment of the liquidating receiver. Having once given such consent in open court, thereby foreclosing the need for any further testimony to show the deadlock and irreparable injury, appellants will not now be heard to deny the necessity for the receivers' appointment. Nor can appellants be heard to assert that they were denied due process of law when, in a hearing held for the express purpose of affording due process, they consented to the appointment of the receiver and thus, impliedly if not expressly, admitted the *necessity for* such an appointment.

There have been few cases decided under the provisions of the Pennsylvania Business Corporation Law of 1933, supra, herein question. However, in a situation such as the instant case, the express terms of the statute make little difference. The appellants, by their consent and acquiescence to the appointment of the receiver, induced the court below to take the action of which they now complain and should be foreclosed from complaining about the order of the court. Cf: In re Sherwood's Estate, 206 Pa. 465, 56 A. 20; Bergman v. Straus, 264 Pa. 439, 107 A. 810; Gough v. Halperin, 306 Pa. 230, 159 A. 447; Thomas v. Hartt, 136 Pa. Super. 84, 7 A. 2d 30.

[3] Appellants argue that by taking an appeal to this Court and causing a certiorari to be issued to the court below they effected what amounts to a supersedeas and removed all jurisdiction from the court below in the matter in litigation pending determination of the appeal.

It would be well to emphasize at this point that appellants never were denied a supersedeas—throughout the entire course of the proceedings subsequent to the filing of their appeal they never requested one. In fact, the record

clearly shows that between the filing of the appeal, on December 19, 1956, and the sale of the assets of the corporation on January 8, 1957, appellants took an active part in all the proceedings in the court below to the extent of requesting and receiving two continuances and actually bidding at the sale. Furthermore, during the course of the proceedings they were specifically advised by the court below that an appeal did not ipso facto act as a supersedeas.

Appellants rely, for authority in support of their position, upon Harwood v. Bruhn, 313 Pa. 337, at page 341, 170 A. 144, 145. In that case, this court quoted as follows from Gilbert v. Lebanon Valley Street Railway Company, 303 Pa. 213, 218, 154 A. 302:

> "'At common law a court of first instance is without jurisdiction to proceed with a cause after the record has been removed to an appellate court. This rule still applies in the absence of a statute providing otherwise.'"

As pointed out by the lower court, the facts of the Harwood case are very different from those involved in the instant appeal. The appeal in that case was taken from the lower court's order striking off plaintiff's judgment against defendant. It is obvious that no bond need be filed in order to effect a supersedeas in such a situation because there is no party in need of the protection afforded by such a bond. The instant case, however, presents a situation in which the appellees, as stockholders entitled to share in the distribution of the proceeds from the sale of the corporate assets, could easily be injured by a change in the value of the corporation's assets during the period of delay necessitated by a stay of the proceedings.

The lower court correctly distinguished the Harwood case, as it applies to the instant situation, as follows:

> "If, on the contrary, in that case the lower court had refused to stroke off the judgment, or refused to open the judgment, or refused to stay execution (in a situa-

tion where the judgment was properly entered but not yet collectible), and it was the defendant who would have appealed, then it is clear that under applicable statutes the mere taking of an appeal by him would not have stayed the plaintiff's proceedings in the court below, but the defendant would have had to obtain a supersedeas and file a bond. * * *.

"In Shinn v. Stemler, 159 Pa. Super. 129, at page 130 [47 A. 2d 294], which was an appeal by defendant from an order of the court making a rule absolute for citation for the possessior of real estate, the court said: 'The question presented is whether that appeal nevertheless acted as a supersedeas. It did not. The Act of May 19, 1897, P. L. 67, as amended, 12 P. S. §1133 et seq., rules appeals on the question of supersedeas; and a supersedeas operates only in favor of those who ask for and have done those things necessary to obtain it.' Drabant v. Cure, 280 Pa. 181, 187, 124 A. 340; Koenig v. Curran's Restaurant & Baking Co., 121 Pa. Super. 201, 205, 207, 183 A. 451."

We fully approve the reasoning of the court below. In a situation such as this, where a stay could cause irreparable damage to the value of this corporation which has already suffered loss of borrowing power and business prestige because of this bitter dispute, we cannot hold that appellants were entitled to a supersedeas, especially since they neither requested one nor did those things necessary to obtain one. Act of May 19, 1897, P. L. 67, §12, as amended, 12 P. S. §1149. Especially is this true where, as here, the court ordered the sale prior to the appeal, the appellant had consented to the court's action and consequently had no basis for appeal and the appellants participated fully in all proceedings subsequent to the present appeal to the extent of securing continuances and bidding at the sale.

Appeal dismissed.